Sexual Harassment and Abusive Behavior Training Requirements Expand Significantly

By Steve Marmaduke, Esq.

Commmencing in 2015, California employers with 50 or more employees were required to provide two hours of training to supervisory employees focusing on the prevention of sexual harassment and abusive conduct. With the enactment of Senate Bill 1343 (Government Code Section 12950.1), California has expanded these training requirements effective January 1, 2019. The new law and supporting regulations provide that employers with five or more employees now have an affirmative obligation to provide training and education regarding sexual harassment and workplace conduct to both supervisors and non-supervisory employees. Specifically, commencing in 2019, employers must provide two hours of training for supervisors and one hour of training for non-supervisory employees every two years.

Applies to Employers of Five or More Employees

A threshold of questions for a small business is what constitutes “five or more employees.” The definition of employee includes full-time, part-time, and temporary workers. Further, the employee count includes others providing services to the employer under contract, which includes independent contractors. The law does not exclude owners of professional corporations who are also employees of such corporation from the employee count. Thus, it is reasonable to assume that these owners are included in the employee count, particularly if they have supervisory responsibilities.

Training Timetable and Cycles

The statutory scheme requires that the training be completed by January 1, 2020 and on an every other year cycle thereafter. Even if an employer provided supervisory training in 2018, they will need to provide training for employees in 2019. The next training cycle will be in 2021, as it must be completed by January 1, 2022. As employees come and go, however, employers may have to provide training on a more frequent basis. For instance, any employee appointed to a supervisory status must be trained within six months of such appointment, whether he or she was an existing employee or a new hire. Even if less than two years has expired since the newly appointed supervisor has received his or her training before the employer’s two-year training period, that supervisor must undergo training again to become synchronized with the employer’s two-year cycle. Beginning January 1, 2020, seasonal and temporary employees, or any employee that is hired to work for less than six months, shall be provided training within the earlier of six months or 100 hours worked.

Tracking Compliance

The employer has the obligation to track compliance. The employer may wish to issue certificates of completion but is not required to do so. Employers must, however, maintain documentation of training provided to its employees for a minimum of two years. This documentation should include the names of the supervisors and employees trained, the date of training, the sign-in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials comprising the training, and the name of the training provider.

Training Objectives

The learning objectives for the training sessions as mandated by the regulations are: (1) to assist California employers in changing or modifying workplace behaviors that create or contribute to sexual harassment; (2) to provide trainees with information relating to the negative effects of abusive conduct in the workplace; and (3) to develop, foster, and encourage a set of values among supervisory employees that will assist them in preventing and effectively responding to incidents of sexual harassment, and to properly address and correct wrongful behavior (which is not defined). The regulations further set forth specific topics that
must be included in the training, which include:

1. The definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the Federal Civil Rights Act of 1960 (Title VII).

2. FEHA and Title VII statutory provisions and case law principles concerning the prohibition and the prevention of unlawful sexual harassment, discrimination, and retaliation in employment.

3. The type of conduct that constitutes sexual harassment.

4. Remedies available to sexual harassment victims in civil actions and potential employer/individual exposure to liability.

5. Strategies to prevent sexual harassment in the workplace.

6. The supervisor’s obligation to report sexual harassment, discrimination, and retaliation.

7. Practical examples and hypotheticals which illustrate sexual harassment, discrimination, and retaliation.

8. The limited confidentiality of the complaint process.

9. Resources for victims of unlawful sexual harassment and to whom employees should report alleged incidences.

10. Appropriate remedial actions to correct harassing behavior.

11. Training on what to do if a supervisor is accused of harassment.

12. Providing all supervisors with a copy of the employer’s harassment policy.

13. A review of abusive conduct including discussions regarding conduct undertaken with malice that a reasonable person would find hostile and abusive, such as derogatory remarks, insults epithets, and the like.

The training on sexual harassment shall also include and address harassment based on gender identity, gender expression, and sexual orientation and provide specific examples. Finally, the training must have questions that assess learning, skill building activities to assess understanding and application of content, and hypothetical scenarios about harassment with questions.

Who can conduct the training?
Obviously, the content and scope of these training seminars is beyond the educational and experiential backgrounds of most veterinarians. In fact, the law requires that the training be conducted by qualified trainers. Those eligible to be qualified trainers is limited to (1) attorneys with at least two years of membership with a state bar and whose practice includes employment law; (2) human resources professionals or harassment professional consultants with two years practical experiences in the areas of discrimination, retaliation, and sexual harassment; and (3) law school, college, or university instructors with postgraduate degrees or hold California teaching credentials and 20 hours of experience in instruction regarding employment law under FEHA or Title VII. Certainly many small employers, and even many larger businesses will lack the credentialed training personnel to lead these training sessions.

Training Methods
Although the training must be “effective interactive training,” there is considerable flexibility as to the delivery method. It may be in a classroom environment, a webinar, or e-learning as long as there in an interactive element and trainees are free to ask questions. Interestingly, the required content for the one hour and the two hour sessions are the same, but the sessions can overlap. Given the extensive content requirements, it may be challenging to address all the required topics in a two-hour session let alone in one hour.

Overwhelmed? Packaged Products are Available
The California Department of Fair Employment and Housing (DFEH) will be required to develop a one-hour and a two-hour training course in accordance with the training and content requirements. Online training courses will be available on the DFEH website and shall contain interactive features which will require the viewers to respond to questions periodically in order for the online training courses to continue. As of this time, however, the DFEH has yet to develop the website training courses. In the interim period, the DFEH
Steve Marmaduke, Esq.

Mr. Marmaduke has been a partner with Wilke Fleury for 26 years and has been practicing law in California for over 35 years. One of his primary focuses is the representation of physicians and medical groups in matters ranging from corporate structure, mergers and acquisitions, joint ventures, business transactions, regulatory issues, and professional employment.

Mr. Marmaduke is part of the CVMA’s Legal Services Program, a program designed to assist CVMA member veterinarians with workplace safety, legal issues, and laws and regulations that affect the veterinary profession.